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IN THE

Supreme Court of the United States

October Term 1967
No. 1052

ROBERT E. BOEHME,
Petitioner,
v.
STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Statutory and Constitutional Provisions Involved	4
Statement	5
I. Pleadings, Prior Proceedings	5
II. Essential Facts	5
III. Stages at Which Federal Questions Were Raised	11
Reasons for Granting The Writ	13
Conclusion	19
Appendices:	
Appendix A Judgment of Trial Court	A- 1
Appendix B Opinion of Washington State Supreme Court	A- 4
Appendix C Remittitur	A-24
Appendix D Constitutional Provisions	A-25
Appendix E Statutory Provisions	A-27

TABLE OF AUTHORITIES

Table of Cases

Berger v. United States, 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629 (1935) 19

Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) 18

Cochrane v. United States, 157 U.S. 286, 39 L. Ed. 704, 15 S. Ct. 628 (1895) 17

Escobedo v. Illinois, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964) 19

Page

Green v. McElroy, 360 U.S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 16

Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) 13

Hagner v. United States, 285 U.S. 427, 76 L. Ed. 861, 52 S. Ct. 417 (1932) 17

Meyer v. Nebraska, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923) 13

Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935) 18

Porter v. United States, 298 F. 2d 461 (1962) (5th CCA) 19

Sheppard v. Maxwell, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966) 4, 12, 18

State v. Boehme, 71 Wn. Dec. 2d 609 ..... A-4

cf. State v. Cerenzia, 134 Wash. 500, 236 Pac. 80 1925) 19

Wilner v. Committee on Character & Fitness, 373 U.S. 96, 10 L. Ed. 2d 224, 83 S. Ct. 1175 (1963) 15, 17

Constitutional Provisions

Fourth Amendment to the United States Constitution A-25

Fifth Amendment to the United States Constitution A-25

Sixth Amendment to the United States Constitution A-25

Ninth Amendment to the United States Constitution A-25

Fourteenth Amendment to the United States Constitution A-25-26

Statutes

28 U.S.C. § 1257(3) 2

RCW 9.11.010 ..... 5, A-27

Page

Texts

Wharton's Criminal Law and Procedure by Ronald A. Anderson, 1957, published by Lawyers Coop. Publishing Company.....17

Wigmore on Evidence, 3rd Ed. 1940, Vol 3, 5; published by Little, Brown & Company.....16, 19

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Washington

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Robert E. Boehme, M.D., a citizen of the United States of America and the State of Washington, prays that this court issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Washington affirming the judgment of the Superior Court of the State of Washington for Pierce County determining that the petitioner is guilty of the crime of First Degree Assault and sentencing him to confinement in the State Penal Institution for a period of not more than 20 years.

OPINIONS BELOW

The judgment and sentence of the Superior Court of Washington for Pierce County was entered upon

the verdict of the jury without opinion after the motion for new trial was denied. (Appendix A)

The opinion of the Supreme Court of the State of Washington affirming the decision of the trial court is printed in Appendix B, and is reported in 71 Wash. Dec. 2d 609, (1967). The decision of the Supreme Court of the State of Washington was rendered on July 18, 1967 and the Petition for Rehearing was denied and the judgment became final on the 8th day of December, 1967.

A stay of judgment was denied by the Washington Supreme Court and was also denied by the United States Supreme Court on December 14, 1967 and petitioner is now in prison in Washington State.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3):

> ". . . Where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . . "

because the petitioner is claiming title, rights, privileges and immunities under the Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

The rules of this Court under which the Petition lies are Rule 19, providing for Certiorari to the State Courts; Rule 22, allowing a petition to review a judgment of a state court to be filed within 90 days after the final entry of such judgment; and Rule 23 prescribing the form and the contents of the petition.

QUESTIONS PRESENTED

1. Did the action of the trial court in requiring and admitting the testimony of the wife's physicians as to confidential disclosures made in the course of treatment by the petitioner's wife deprive the petitioner and his wife of their constitutional rights of privacy in marriage and their property rights therein in violation of the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States?

2. Did the action of the trial court in admitting hearsay testimony as to the results of certain chemical tests for cholinesterase which were not performed by, nor seen by, nor described by, the witness who testified from memory concerning the results (the person who performed the tests never being present in court at any time) deny the defendant his right to confront the witnesses against him as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States?

3. Did the action of the trial court in permitting the oral amendment of the Information by the prosecution during the trial so as to change the entire theory of how the poison was administered deprive the defendant of his constitutional right to be timely and adequately informed as to the nature of the charges against him as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the Unit d States?

4. Did the extensive pre-trial publicity, the action of the trial court in setting aside a portion of the courtroom for the press, the extensive television, ra-

dio, magazine and newspaper coverage, the free passage of the press to and from the courtroom during the trial, the hostile, partisan mob in the hall through which the jurors had to pass each of the many days of the trial, deprive the petitioner of a fair trial under the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States in violation of the holding in *Sheppard v. Maxwell,* 384 U.S. 333, 16 L.Ed 2d 600, 86 S.Ct. 1507 (1966)?

5. Did the action of the State of Washington in holding a felony charge over the head of Wanda Ostby, one of the key witnesses for the prosecution (the other woman necessary for the alleged motive) during the trial of the petitioner and then dismissing the charge immediately after his conviction by the jury, and the action of the prosecutor, John McCutcheon, during the trial when he, the prosecutor, represented to the trial court that there were no criminal charges pending against the said Wanda Ostby, together operate to deprive the petitioner of his right to a fair trial under the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions under which the petitioner claims title, rights, privileges and immunities are: The Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution. They are printed in full in Appendix D.

The Statute of the State of Washington defining the

crime of First Degree Assault is R.C.W. 9.11.010, and is printed in full in Appendix E.

STATEMENT

I. Pleadings and Prior Proceedings

The petitioner, Robert E. Boehme, was charged by an amended written Information in the Superior Court of the State of Washington for Pierce County with the crime of Assault in the First Degree (R.C.W. 9.11.010) allegedly committed by the injection into his wife's (Mary Boehme) buttocks of an anticholinesterase agent and/or promozine (sparine) with the intent to kill. A plea of Not Guilty was entered and the case tried before a jury.

On the jury's verdict of guilty, your petitioner was sentenced to not more than 20 years confinement in a Washington Penal Institution. The motion for new trial was denied and appeal was taken to the Washington State Supreme Court, which affirmed the decision of the trial court and denied a petition for rehearing on December 8, 1967. A stay of judgment was denied by the Washington State Supreme Court and by the United States Supreme Court and petitioner is now confined in a Washington prison.

II. Essential Facts

From the evidence presented it appeared that Mary Boehme, the wife of the petitioner, was injured by a falling plank, was taken to a hospital in Tacoma, Washington, and was treated for a brain injury. Thereafter, while she was in the hospital, the petitioner gave her an injection in the buttocks.

Petitioner asserted that this injection was ritalin, a harmless, mild stimulant, administered in the belief that his wife's continued unconsciousness was the result of a self-administered dose of sparine. The prosecution contended that the injection was an anticholinesterase drug and was done with the intent to kill, and that petitioner's motive was an affair with another woman, Wanda Ostby.

Cholinesterase has been defined as a class of enzymes found in the blood and tissue of the human body which have the ability to act upon acetylcholine and divide it into acetic acid and choline thereby destroying its ability to conduct electrical impulses. Acetylcholine is present in the body and is important because it stimulates the nerve impulses in the parasympathetic nervous system. When the cholinesterase level is low, acetylcholine accumulates resulting in the continuous stimulation of the parasympathetic nervous system which produces undesirable symptoms, such as sweating, salivation, dim vision, myosis of the pupil of the eye, fibrolation or twitching of the muscles, nausea, vomiting, diarrhea, respiratory failure, cyanosis, etc.

There are at least two distinct forms of the enzyme; acetylcholinesterase, sometimes known as "true" cholinesterase, which is found in the nerve tissues and the red blood cells, and pseudo-cholinesterase, which is found in the blood plasma and various other tissues of the body. Neither enzyme has ever been actually seen or fully understood, but its presence or absence is believed to be significant for diagnostic purposes

and blood is commonly used to test for it, usually by dividing the blood into red cells and plasma and testing each separately. Its presence or absence is determined by whether or not acetic acid is liberated from a standard solution of acetylcholine. The activity of the enzyme is determined by how much acetic acid the cholinesterase will liberate in a measured period of time from a solution of known acetylcholine concentration. There are many methods for doing this: manometric, titrimetric, electro-metric and colorimetric and many variations and combinations of each of the general methods. Any test by any method depends upon the exact measurement of exceedingly small amounts of chemicals and of specimens, exact control of temperature, and exact measurement of time, and the possibility of error is therefore very large.

The function of cholinesterase in the body can be interfered with by various chemicals. Organic phosphorus compounds are irreversible inhibitors in that they permanently destroy the enzyme. Carbamates are reversible inhibitors in that they do not destroy the enzyme but merely interfere on a temporary basis with its function. Proceeding on the theory that Mary Boehme had been poisoned with an anti-cholinesterase agent, the prosecution began its case with a reference to organic phosphorus poisons (used for garden sprays) and then presented the evidence of Dr. Petty of Baltimore, Maryland, concerning tests made for cholinesterase levels in blood samples taken from Mary Boehme without her consent by her attending physicians. Dr. Petty testified that he had not per-

formed the tests himself but that a technician who he first identified as Dr. Richard Johns (St. 524) and later identified as Orindorff (St. 525) told him, Dr. Petty, the results of the tests. Dr. Petty then proceeded over proper objection on hearsay and constitutional grounds to testify from memory *as to what the technician had told him* as to the results of the tests and placed the results on a blackboard scratch pad (Ex. 34) as follows:

CHOLINESTERASE LEVEL IN MARY BOEHME'S BLOOD

	TIME	RED BLOOD	PLASMA
1.	10:40 P.M. 6-30-65	7.1	:0011
2.	2:00 A.M. 7- 1-65	7.05	1.1
3.	7- 9-65	4.65	2.2
4.	7-15-65	4.75	2.8
5.	7-15-65	4.61	2.1
6.	Control	4.65	1.8

(R. St. 520-520-A; St. 533; Ex. 34)

thereby offering the out of court statement of the technician as proof of the matter asserted. From the fact that the plasma reading at 10:40 in the evening (approximately two hours after the alleged assault) was .0011, and was near normal at 2 A.M., the next morning, and that the red blood readings were not below normal, *Dr. Petty concluded and testified that Mary Boehme had been poisoned with a carbamate poison* (St. 548). Dr. Petty also testified that sparine would have no effect on cholinesterase levels in the body (St. 548).

Tests for carbamate poisons may also be made

from the urine. In this case urine specimens were taken (Ex. 22, 23) and were personally tested by Dr. *Freimuth, a chemist and toxicologist, witness for the prosecution, who, on the basis of his tests, ruled out any carbamate poison* (St. 498, 499).

Nonetheless, the case was submitted to the jury on the basis of Dr. Petty's testimony that Mary Boehme had been poisoned with a carbamate poison. The man who allegedly performed the tests was never in court, never testified, and no explanation was ever offered by the prosecution as to why he could not be in court. No hint as to his identity was given to defense counsel at any time prior to the admission of the hearsay testimony of Dr. Petty, which was the only evidence that would support the state's theory of poisoning by an anti-cholinesterase agent.

During the course of the trial the testimony of the attending physicians, the hospital personnel and the nurses who treated Mary Boehme to establish physical symptoms and the identity of the specimens taken and their observations of her as a patient were admitted over her objection and over the objection of her husband, the petitioner, all of which testimony was prejudicial to the defendant.

Late in the trial, the prosecution was permitted over the petitioner's objection to orally amend the Information to permit the introduction of evidence of sparine found in an intravenous bottle which was taken from Mary Boehme's room (its custody for two weeks was unaccounted for) and to offer over objection subsequent testimony of Dr. Petty (St. 558)

that Mary Boehme had been poisoned with sparine. (This is in contradiction to his earlier testimony that she had been poisoned with a carbamate poison).

Petitioner objected to its admission and to the instructions given to the jury upon the new theory and at no time waived his constitutional rights.

The testimony of Wanda Ostby, the other woman in the case, was the principal evidence of motive. She testified as to an affair with defendant and as to incriminating statements he allegedly made. On cross examination she denied that there were any criminal charges pending against her or that any inducement had been made to her to secure her testimony. The prosecuting attorney sprang to her defense and assured the court that there were no criminal charges of any kind against her and further cross examination was thereby foreclosed. After the verdict of the jury, petitioner's counsel discovered that the representations of the prosecuting attorney were false and that a charge of grand larceny had been pending against Wanda Ostby in Kitsap County during the petitioner's trial and that it had been dismissed immediately after the jury's verdict was in. Nonetheless, the motion for new trial on this and other grounds was denied.

The trial was preceded by extensive publicity about the petitioner's prior trial and acquittal for a similar offense allegedly committed by him against his first wife, and extensive radio, television, newspaper and magazine coverage of every aspect of the case before and during the trial made the matter everyday con-

versation for everyone, so that it was impossible to secure a jury who had not heard or read about the matter. During the trial the judge set aside a portion of the courtroom for the press, and they were allowed to move freely in and out, although the spectators had to stand in line for hours for access to the courtroom. That throughout the trial the jury had to pass to and from the courtroom through a large and hostile crowd in the hallway and were subject to picture taking of both T.V. and newspaper photographers.

III. The Stages at Which Federal Questions Sought to Be Reviewed Were Raised

1. As to the constitutional right to privacy between husband and wife and physician, it was raised at the trial level by a demurrer to the Information, by repeated objection to the admission of the evidence of the physicians and at the motion for new trial. Upon appeal it was presented in the assignments of error in the brief and was denied on constitutional grounds in the opinion of the Washington State Supreme Court. (App. B).

2. As to the constitutional right to confront and cross-examine the witness who performed the blood tests, it was raised at the trial level by repeated objections to the admission of the testimony of Dr. Petty and again on the motion for new trial. Upon appeal it was presented in the assignments of error, in the brief and it was denied on constitutional grounds in the opinion of the Washington State Supreme Court. (App. B)

3. As to the constitutional right to seasonably know whereof the defendant is charged, it was raised during the trial by the objection to the admission of evidence of the contents of the intraveneous bottle and to the tests made thereon (R. St. 1157); by objection to the oral amendment to the information; and by objections to the instructions given by the trial court to the jury. It was raised again on the motion for new trial. Upon appeal it was presented in the assignments of error in the brief and it was denied upon constitutional grounds in the opinion of the Supreme Court of Washington (App. B).

4. As to the constitutional right of a fair trial as guaranteed under the doctrine of *Sheppard v. Maxwell, supra,* this issue was raised in the trial court by the motion for new trial and in the alternative for a writ of *coram nobis* (The *Sheppard* case not having been decided at the time of trial). Upon appeal it was presented in the assignments of error in the brief, and the issue was decided by the Washington State Supreme Court on constitutional grounds against the petitioner.

5. As to the constitutional right of a fair trial being denied by the misrepresentation of the prosecuting attorney that no criminal charges were pending against Wanda Ostby, when in fact a felony charge was being held over her head during the trial, this issue was raised as soon as it was discovered, by the motion for new trial. Upon appeal it was presented in the assignments of error, in the brief and it was denied in the opinion of the Supreme Court of Washington on constitutional grounds.

REASONS FOR GRANTING THE WRIT

1. Throughout these proceedings beginning at the trial and to the present, Mary Boehme, the wife, the alleged victim, and the petitioner, the husband, the alleged assailant, have asserted his innocence, have lived together as husband and wife and have objected to the proceedings and to the disclosure of her confidential communications to her physicians. The action of the trial court in compelling the physicians to disclose the confidential communications and the proceeding itself invaded the privacy of the marriage-relationship guaranteed by the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965)

Meyer v. Nebraska, 262 U.S. 390, 399, 67 L.Ed. 1042, 1045, 43 S.Ct. 625 (1923)

2. Where chemical tests for cholinesterase levels in the blood are made their reliability depends upon certain things:

(1) An uncontaminated, unspoiled specimen, proper uncontaminated chemicals, and uncontaminated equipment.

(2) A proper method or procedure.

(3) Exact measurements of specimen and chemicals used.

(4) Exact measurement of time.

(5) Exact measurement and control of temperature.

(6) A proper measuring machine, in proper working order, standardized for the performance of the particular tests to be performed.

(7) A skilled and competent person to perform the tests.

(8) A proper record of the various steps of the test.

It follows that a careful scrutiny of the manner in which the tests are performed is absolutely necessary. Moreover, as is apparent from the results themselves, tests do not ordinarily read to four decimal places, but only to the nearest tenth of a unit insofar as the plasma is concerned. The inference of a misplaced decimal and hence a completely wrong diagnosis is almost inescapable as a reading of 1.1 is near normal. The right to cross-examination of the man who actually performed the test is not an idle technicality but the whole guts of the problem of finding the truth—and it was not found in this case. The error asserted was prejudicial in the highest degree. The hearsay testimony as to the results of the tests was absolutely essential to the prosecution's charge of poisoning by the administration of an anti-cholinesterase agent.

Dr. Petty's statement to the court that he had talked to a technician who was under his general supervision only (St. 526), who had told him that he had performed tests upon blood specimens for cholinesterase and reached certain results, was a hearsay statement. No opportunity was afforded the defendant to see the technician or to cross-examine him; no opportunity

was afforded to check whether Dr. Petty even remembered the results of the tests correctly; no opportunity was afforded to check the true identity of the technician, his skill, the manner in which the tests were performed, the kinds or measurements of chemicals used, the accuracy of his results; no opportunity was afforded to know for certain that the tests were even performed. (Dr. Petty stated he did not know the names of the individuals involved) (St. 524, 526).

The testimony of Dr. Petty as to the out-of-court statements of another individual were offered for the proof of the truth of the matters asserted. They denied to the petitioner the right to confront the witnesses against him guaranteed by the United States Constitution.

The right of a defendant to confront the witnesses against him grew up at Common Law and was thereafter recognized by the Sixth and Fourteenth Amendments to the United States Constitution. It is essentially the right to observe the witness and the right to cross-examine him. The right to cross-examine is the more important and has been described by Wigmore as the indispensable requirement of the constitutional right of confrontation. There are recognized exceptions to the hearsay rule but the error complained of in this case is not one of them. The Constitution of the United States does not permit the engrafting of such an exception to the constitutional rght.

Wilner v. Committee on Character & Fitness, 373 U.S. 96, 10 L.Ed. 2d 224, 83 S.Ct. 1175 (1963)

Green v. McElroy, 360 U.S. 474, 3 L.Ed. 2d 1377, 79 S.Ct. 1400

Wigmore on Evidence, 3rd Ed. 1940, Vol. V, p. 127, sec. 1397 (published by Little, Brown & Company)

The action of the trial court in receiving Dr. Petty's testimony as to the out-of-court statements of another as to the results of the chemical tests denied the petitioner his right to confront the witnesses against him and denied him a fair trial as guaranteed by the Fourteenth Amendment.

If the ruling in this case stands, no prosecutor will ever be required to produce the man who took the tests in a drunk-driving case, a fingerprint case, a handwriting case, a suspected-document case, a counterfeiting case or a ballistics case—a prosecutor will only be required to produce the head of the expert's department, who will testify as to the results of any tests as told to him. Cross-examination will be impossible. The right to cross-examine the state's witnesses, to confront them as guaranteed by the Constitution will be almost completely destroyed.

3. The Information as amended, upon which trial was begun, charged the petitioner with the crime of First Degree Assault in that it was alleged that petitioner injected into her buttocks an anti-cholinesterase agent and/or promazine (sparine) (Sup. St. 16, Reply Brief 6). In the early stages of the trial the testimony of Dr. Petty was that this substance was a carbamate poison (R. St. 548) which is an anticholinesterase agent. In the late stages of the trial,

over defense objection, the trial court allowed the prosecution to amend the Information to permit evidence that sparine was administered via an intraveneous bottle, and Dr. Petty then testified that Mary Boehme was poisoned with sparine (R. St. 558) which is not an anticholinesterase agent. The jury was instructed in accordance with the amended Information. Petitioner was not prepared for this change in the prosecution's attack because he did not have adequate notice nor time to prepare his defense.

Petitioner had the right under the Sixth and Fourteenth Amendments to the Constitution of the United States to be "informed of the nature and the cause of the accusation against him" and implicit in this right is that the notice be seasonable so that the defendant have adequate time to prepare his defense.

Wilner v. Committee on Character & Fitness, 373 U.S. 96, 10 L.Ed. 2d 224, 83 S.Ct. 1175

Cochrane v. United States of America, 157 U.S. 286, 39 L. Ed. 704, 705, 15 S.Ct. 628 (1895)

Hagner v. United States of America, 285 U.S. 427, 76 L.Ed. 861, 865, 52 S.Ct. 417 (1932)

Wharton's Criminal Law & Procedure by Ronald A. Anderson, Vol. IV, pages 556-559, Sec. 1762 (published by Lawyers Coop. Publishing Co. 1957)

4. The petitioner was entitled to a fair trial free from the influence of the hostile mob present in the hallways through which the jurors had to pass each day of the trial; free from the prejudicial pretrial publicity by radio, T.V. and newspapers; free from

the improper influence of the press during the trial which had set aside to it a specific portion of the courtroom from which reporters passed freely during the trial. *Sheppard v. Maxwell,* 384 U.S. 333, 16 L.Ed. 2d 600, 86 S.Ct. 1507 (1966).

5. When during the course of the trial counsel for the petitioner undertook to coss-examine Wanda Ostby, the other woman in the case, whose testimony as to an affair and incriminating statements had been offered by the prosecution to establish motive, as to whether or not she was charged with a crime and awaiting trial thereon, the prosecuting attorney then orally represented to the court that there were no outstanding criminal charges against her. After the verdict, petitioner discovered that in fact, the State of Washington had held a prosecution for Grand Larceny in Kitsap County over the head of Wanda Ostby throughout the trial and immediately dismissed the charge after the verdict against petitioner was rendered. The matter was then raised on the motion for new trial and denied. This conduct of the prosecuting attorney denied the defendant a fair trial as guaranteed by the Constitution.

It is the duty of the prosecutor to refrain from improper methods calculated to produce a wrongful conviction, and the suppression by the prosecution of evidence favorable to the accused, violates due process.

Brady v. Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963)

Mooney v. Holohan, 294 U.S. 103,55 S.Ct. 340, 79 L.Ed. 791 (1935)

Berger v. U.S., 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629 (1935)

Porter v. U.S., 298 F. 2d 461, 464 (1962) 5th CCA

Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed. 2d 977, 84 S.Ct. 1758 (1964)

cf. State v. Cerenzia, 134 Wash. 500, 503, 236 Pac. 80, 82 (1925)

Wigmore on Evidence, Vol. III, Sec. 967-8, p. 525, 3rd Ed. (1940) (Published by Little, Brown & Company)

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 22,1968.